

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

WILMINGTON SAVINGS FUND)	
SOCIETY, FSB,)	
)	
Plaintiff/)	
Counterclaim Defendant,)	
)	C.A. No. 08C-06-030 PLA
v.)	
)	
ANTHONY E. ANDERSON,)	
)	
Defendant/)	
Counterclaim Plaintiff,)	
)	
and)	
)	
WORLD WIDE CONSTRUCTION,)	
LLC, and DEIRDRE LACEY,)	
)	
Defendants.)	

Submitted: January 9, 2009

Decided: March 9, 2009

ON PLAINTIFF'S MOTION TO DISMISS
GRANTED
ON DEFENDANT ANDERSON'S
MOTION TO AMEND COUNTERCLAIM
DENIED

Garvan F. McDaniel, Esquire, BIFFERATO GENTILOTTI, LLC,
Wilmington, Delaware, Attorney for Plaintiffs.

Anthony E. Anderson, Defendant, *pro se*.

ABLEMAN, JUDGE

I. Introduction

Plaintiff Wilmington Savings Fund Society, FSB (“WSFS”) filed suit against Defendants Anthony Anderson (“Anderson”), Dierdre Lacey (“Lacey”), and World Wide Construction, LLC (“World Wide”), claiming that Anderson and Lacey fraudulently obtained a loan to World Wide and defaulted on payments. Anderson counterclaimed against WSFS. Anderson alleges that WSFS fraudulently misrepresented the loan terms and violated the federal Truth In Lending Act and related regulations. WSFS now moves to dismiss Anderson’s Counterclaim for failure to state a claim upon which relief can be granted. Anderson asserts that his counterclaims are viable, but, in the alternative, seeks to amend his Counterclaim.

The Court concludes that Anderson lacks standing to argue that WSFS committed fraud against World Wide. Furthermore, Anderson’s counterclaims under the Truth In Lending Act and its implementing regulations are barred, because the loan was for commercial purposes and thus beyond the scope of the consumer protection laws he attempts to invoke. Anderson has not proposed a viable amendment to his Counterclaim. Therefore, for the reasons discussed more fully herein, WSFS’s Motion to Dismiss is granted, and Anderson’s Motion to Amend is denied.

II. Facts

Anderson is the president of World Wide. According to WSFS, Anderson approached Lacey in 2007 to seek her assistance in obtaining a loan for World Wide. WSFS extended a loan to World Wide on March 30, 2007. Acting on behalf of World Wide, Lacey executed and delivered to WSFS a promissory note (“the note”) for \$50,000.00 and a commercial guaranty (“the guaranty”).¹ Both documents listed World Wide as the borrower.² Lacey’s signature on the note identifies her as World Wide’s manager.³ The note includes a provision requiring immediate payment upon the lender’s demand.⁴ In addition, the guaranty document provides that Lacey “absolutely and unconditionally guarantees full and punctual payment and satisfaction” of the loan.⁵

WSFS contends that Lacey was never an officer, director, or member of World Wide, but that she agreed with Anderson to defraud WSFS by presenting herself as World Wide’s manager to obtain the loan on World

¹ Docket 1 (Pl.’s Compl.), ¶¶ 6-8.

² Docket 1, Exs. A, B.

³ Docket 1, Ex. A, at 3.

⁴ Docket 1, Ex. A, at 1.

⁵ Docket 1, Ex. B, at 1.

Wide's behalf.⁶ WSFS states that Lacey and Anderson opened a business checking account with WSFS, which Anderson used to pay Lacey between \$10,000 and \$40,000 for her role in fraudulently obtaining the loan.⁷ According to WSFS, the defendants have defaulted on the note.

III. Procedural History

On June 5, 2008, WSFS filed suit in this Court against World Wide, Lacey, and Anderson. In its Complaint, WSFS advances six theories of liability: breach of contract; violation of Delaware's Consumer Fraud Act; misrepresentation; civil conspiracy; aiding and abetting; and estoppel. WSFS obtained default judgment against World Wide and summary judgment against Lacey.⁸

On October 21, 2008, Anderson filed an Answer to WSFS's Complaint, as well as an eight-count Counterclaim.⁹ In his Counterclaim, Anderson brings claims under state tort law, the federal Truth In Lending Act (TILA), and federal consumer credit protection regulations. First, Anderson claims that WSFS fraudulently induced him into obtaining the

⁶ Docket 1, ¶ 6.

⁷ *Id.*, ¶¶ 11-12.

⁸ *See* Docket 7; Docket 14.

⁹ Docket 6.

loan (Count I). Next, Anderson alleges that WSFS violated various provisions of TILA on the following grounds: failure to properly disclose the amount financed, prepaid finance charges, and other information, and failure to deduct prepaid finance charges and fees¹⁰ (Count II); failure to provide right to rescission disclosure statements, and inclusion of prohibited terms and conditions in the loan documents¹¹ (Count III); and failure to provide disclosure statements required under TILA in non-open end credit transactions¹² (Count IV). The final four counts of Anderson's Counterclaim assert violations of federal regulations¹³ related to TILA: failure to provide adequate disclosure of rescission rights (Count V); failure to provide rescission or cancellation rights (Count VI); failure to properly format Anderson's right to cancel (Count VII); and deceptive grouping of interest rate disclosures (Count VIII). Anderson seeks rescission of the note, as well as damages and costs.

¹⁰ See 15 U.S.C. §§ 1602(u), 1605(a), 1635, 1638, 1639.

¹¹ See 15 U.S.C. § 1639.

¹² See 15 U.S.C. § 1638.

¹³ See 12 C.F.R. pt. 226 (2008).

IV. Parties' Contentions

Now before the Court is WSFS's Motion to Dismiss Anderson's counterclaims pursuant to Civil Rule 12(b)(6).¹⁴ Anderson responded to WSFS's motion by filing a "Memorandum of Law in Opposition," which the Court will treat as both a Response to WSFS's motion and as a Motion to Amend the Counterclaim.¹⁵

In its motion, WSFS argues that Anderson's counterclaims must be dismissed because the loan in this case is a commercial note that names World Wide as the borrower. Therefore, WSFS urges, Anderson lacks standing to proceed with a fraud claim involving the terms of the loan. WSFS further argues that the note and the guaranty are not subject to TILA or TILA-related federal regulations, which apply only to consumer credit transactions.¹⁶

Anderson responds by arguing that he "is being personally sued . . . [not] as an officer, or in any other capacity" related to World Wide, and therefore the case does not "only [involve] a business loan with World

¹⁴ Super. Ct. Civ. R. 12(b)(6).

¹⁵ Docket 11 (Def. Anderson's Mem. of Law in Opp'n to Mot. to Dismiss).

¹⁶ Docket 9 (Pl.'s Mot. to Dismiss).

Wide.”¹⁷ Thus, he insists that he is within the class of persons TILA is intended to protect.¹⁸ Anderson further suggests that the interests of justice, as evidenced by the alleged statutory violations set forth in his Counterclaim, require rescission of the note.

Finally, Anderson seeks to amend his Counterclaim, to remedy any statements that might be considered “factually incorrect.”¹⁹ He argues that amendment of the Counterclaim would not prejudice WSFS, because WSFS is already aware of the content of his claims. However, Anderson’s motion does not set forth either the factual inaccuracies he seeks to correct or the content of the proposed amendments.

Recognizing that Anderson’s filing could be construed in part as a Motion to Amend, WSFS responded in opposition.²⁰ WSFS requests that the Court deny Anderson leave to amend. First, WSFS argues that Anderson’s motion fails to comply with Rule 15(aa), which requires that the amending party “indicate plainly in the amended pleading in what respect the amendment differs from the pleading which it amends.”²¹ Furthermore,

¹⁷ Docket 11.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Docket 13 (Pl.’s Resp. to Def.’s Mem. of Law).

²¹ Super. Ct. Civ. R. 15(aa).

WSFS argues that granting Anderson leave to amend would “delay the inevitable and frustrate justice,” because the substance of his motion simply reasserts the same consumer credit protection claims set forth in his original Counterclaim.²²

V. Analysis

A. WSFS’s Motion to Dismiss

Upon a motion to dismiss, the Court’s role is to determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”²³ If recovery is possible, the Court must deny the motion to dismiss.²⁴ When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.²⁵ In addition, every reasonable factual inference will be drawn in favor of the non-moving party.²⁶ Nonetheless, the Court need not accept allegations that are “merely

²² Docket 13, ¶ 12.

²³ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

²⁴ *Id.*

²⁵ *Id.*; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007).

²⁶ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

conclusory (i.e., without specific allegations of fact to support them),” and such allegations may not withstand a Rule 12(b)(6) motion.²⁷

1. Fraud Counterclaim (Count I)

An action for fraud requires the claimant to show (1) that the alleged tortfeasor intentionally misrepresented a known fact to him, and (2) that he reasonably relied upon the misrepresentation to his detriment.²⁸ To establish standing, the claimant must also be able to show that he suffered a direct injury; the existence of a collateral or resulting injury alone will not suffice to provide standing.²⁹

Anderson lacks standing to bring a fraud counterclaim against WSFS. Although his Counterclaim states that he is “subject to loss of property and loss of use of property and other damages as a result” of WSFS’s alleged misrepresentations,³⁰ this conclusory language does not demonstrate that he suffered a direct injury. The note and guaranty both list World Wide as the sole borrower, and only Lacey signed the guaranty. Anderson’s name does not appear in either document. The Counterclaim does not plead facts

²⁷ *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

²⁸ *Harman v. Masoneilan Int’l, Inc.*, 442 A.2d 487, 499 (Del. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 525); *see also Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988).

²⁹ 86 C.J.S. *Torts* § 103 (2008).

³⁰ Docket 16 (Counterclaim), ¶ 10.

connecting WSFS's alleged misrepresentations regarding the terms of World Wide's loan with any direct injury to Anderson. Accordingly, he lacks standing to proceed with his fraud counterclaim.

To clarify an apparent point of confusion in Anderson's responsive memorandum, the fact that Anderson has been sued by WSFS does not constitute a "direct injury" that confers standing upon him to challenge representations made to World Wide, nor do WSFS's claims against Anderson as an individual imply that the loan involved an extension of consumer credit. Rather, WSFS's suit named Anderson as a defendant because it includes claims that he is liable as a result of various actions that he allegedly undertook as an individual.

2. Consumer Credit Protection Act Counterclaims **(Counts II, III, and IV)**

Counts II, III, and IV of Anderson's Counterclaim allege that WSFS committed myriad violations of the federal Truth in Lending Act.³¹ TILA was enacted as the first subchapter of the Consumer Credit Protection Act, and consistent with this title, it applies to only consumer transactions. A consumer credit transaction subject to the requirements of TILA occurs when "the party to whom credit is offered or extended is a natural person,

³¹ Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-1667 (2000)).

and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.”³² By contrast, “[c]redit transactions involving extensions of credit primarily for business [or] commercial . . . purposes . . . or to organizations” are expressly excluded from TILA.³³

Here, WSFS extended credit to World Wide, a business entity, as part of a commercial transaction. Both the note and the guaranty identify World Wide as the sole borrower. The note was signed by Lacey as “Manager of World Wide Construction, LLC.” The guaranty is conspicuously labeled on each page as “Commercial Guaranty.” Under these circumstances, Anderson’s allegation that the loan to World Wide constituted a consumer credit transaction subject to TILA is entirely unsupportable, and the Court rejects the assertion. As previously discussed, the fact that WSFS has sued Anderson as an individual does not transform its loan to World Wide into a consumer transaction. Accordingly, Anderson’s second, third, and fourth counterclaims, which are each premised on alleged violations of TILA, must be dismissed.

³² 15 U.S.C. § 1602(h).

³³ 15 U.S.C. § 1603(1).

3. Regulation Z Counterclaims (Counts V, VI, VII, and VIII)

Many of the consumer credit protections provided under TILA have been implemented via Federal Reserve Board regulations known as Regulation Z.³⁴ Counts V through VIII of Anderson's Counterclaim allege that the loan does not conform with Regulation Z requirements. Specifically, Anderson claims that WSFS committed right to cancel, right to rescind, deceptive grouping, and disclosure violations.

Regulation Z does not protect a broader range of transactions than TILA. Section 226.1(c) of Regulation Z emphasizes that it applies when "credit is offered or extended to consumers . . . primarily for personal, family, or household purposes."³⁵ Thus, like TILA, Regulation Z is inapplicable to commercial or business credit transactions.

For the reasons previously discussed in analyzing Anderson's TILA counterclaims, he cannot proceed with those counterclaims arguing that WSFS violated Regulation Z in the terms of a commercial loan. WSFS extended credit to World Wide, not to Anderson, and this business transaction offers no basis for claims under either TILA or Regulation Z.

³⁴ 12 C.F.R. pt. 226.

³⁵ 12 C.F.R. -§ 226.1(c).

B. Anderson's Motion to Amend

Anderson's attempt to salvage his Counterclaim by amending it must be denied, as he has proposed no amendment that could render his counterclaims viable. A party seeking to amend its pleading after a responsive pleading has been filed can do so "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires."³⁶ The moving party is required to "plainly" set forth "in what respect the amendment differs from the pleading which it amends."³⁷ Notwithstanding the Court's liberal approach to Rule 15, an amendment will be denied as futile if the amended claim would not survive a motion to dismiss under Rule 12(b)(6).³⁸

Anderson has failed to describe, plainly or otherwise, the content of his proposed amendments. Anderson's motion focuses on his argument that because WSFS has filed suit against him individually, its loan to World Wide was subject to TILA and Regulation Z. As explored above, this position is misguided. The defects in Anderson's Counterclaim can only be resolved by demonstrating that Anderson has standing to bring a fraud claim

³⁶ Super. Ct. Civ. R. 15(a).

³⁷ *Id.* 15(aa).

³⁸ See, e.g., *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb. 29, 2008).

against WSFS or by showing that WSFS's commercial loan to World Wide was subject to the consumer credit protections offered by TILA and Regulation Z. On the pleadings before it, the Court cannot conceive of any plausible amendment that would accomplish either of these results. Anderson's Motion to Amend is therefore denied.

VI. Conclusion

For the foregoing reasons, WSFS's Motion to Dismiss Anderson's Counterclaim is hereby **GRANTED**, and Anderson's Motion to Amend his Counterclaim is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Garvan F. McDaniel, Esq.

Anthony E. Anderson, *pro se*